

ADVISORY OPINION 2003-10

CONCURRENCE OF VICE CHAIRMAN SMITH, COMMISSIONERS MASON AND TONER

We write separately to respond to comments made by members of the public during the Commission's consideration of this advisory opinion request. While public comments are routinely taken and considered in the Advisory Opinion process, the Commission is neither required, nor have we made it a practice, to specifically address such comments in the adopted opinions.¹ However, because this is one of the first Advisory Opinions issued pertaining to provisions of the Bipartisan Campaign Reform Act ("BCRA"), and given the nature of the comments and commenters, we think that in this case it is important to acknowledge the arguments made in public comments, so that the commenters and the general public know that these matters have been considered in formulating our decision.

The Commission received three comments, from the Campaign Legal Center ("CLC"), jointly from Common Cause and Democracy 21 ("Common Cause"), and from the Center for Responsive Politics ("CRP"). All three comments urged the Commission to find that under the circumstances presented in the Advisory Opinion Request Rory Reid would be an agent of Sen. Harry Reid's and thus subject to the officeholder fundraising limits of BCRA, 2 U.S.C. 441i(e)(1).

All three comments agreed that Rory Reid is not an agent of Senator Harry Reid merely by virtue of their familial relationship. CLC writes, "this determination [that Rory Reid should be found to be an agent of his father] is not based on any concept that the children of Federal officeholders or candidates are *per se* agents under BCRA." CLC Comment at 2. Common Cause echoed, "we do not believe the fact that a person is a relative of an officeholder by itself means the person is an 'agent' of the officeholder for purposes of BCRA." Common Cause Comment at 2. And the CRP added, "we do not believe that the Federal Election Campaign Act (FECA) or the Bipartisan Campaign Reform Act (BCRA) preclude Mr. Reid from raising nonfederal funds for the state party solely because of his familial relationship with Senator Reid." CRP Comment at 1.

Nevertheless, CRP argues that "if Senator Reid authorizes Mr. Reid to raise federal funds on his behalf during a two-year election cycle in which the Senator will seek re-election, we believe BCRA should be interpreted to prohibit Mr. Reid from raising nonfederal funds for the Nevada state party during that two-year election cycle.

¹ We believe that there are sound reasons for not generally addressing comments in the text of Advisory Opinions, including, but not limited to, the fact that such discussions may detract from and make less clear the legal analysis adopted by the Commission.

CRP Comment at 1. CRP argues that otherwise, “agents of federal candidates who raise nonfederal funds would be able to disclaim liability under BCRA simply by saying that the nonfederal funds were not raised on behalf of the federal candidate.” *Id.* at 2. We disagree that this is a sufficient policy ground to find an agency relationship. First, to the extent that CRP’s comments might be read to suggest that a person, acting as an agent of a federal candidate, may escape liability by misrepresenting the nature of his activities, this is not true. One cannot escape liability merely through inaccurate denials. Second, if CRP is arguing that one who is not acting as an agent should nevertheless be subject to BCRA’s limitations on agents, such a reading is contrary to basic tenets of law. See Restatement (Second) of Agency §§ 33, 37, 39, 219 (1958).

More importantly, this type of approach is directly contrary to the regulations adopted by the Commission less than one year ago. Pursuant to these regulations, individuals raising funds as agents of federal officeholders are bound by BCRA’s restrictions on raising nonfederal funds. One is acting as an agent when he: (1) has actual authority to fundraise on the officeholder’s behalf; (2) is acting on behalf of the officeholder and; (3) is soliciting funds in connection with an election. 11 C.F.R. 300.2(b) (definition of agent); *see also* Explanation and Justification: Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule, 67 Fed. Reg. 49064, 49083 (July 29, 2002) (“a principal can only be held liable for the actions of an agent when the agent is acting on behalf of the principal, and not when the agent is acting on behalf of other organizations or individuals.”) *See also* AO 2003-10, FEC Agenda Document 03-39, at 4-8. These regulations recognize the reality that a person may at times raise funds on behalf of a federal candidate, and at times in carrying out duties on behalf of state or local committees. BCRA does not purport to ban all fundraising, but only fundraising by “agents” of a federal candidate. 2 U.S.C §441i(e)(1). A person who is not acting as an agent of a federal candidate is not limited by the law.² The CRP essentially asks the Commission, in the context of this Advisory Opinion, to undo the lawfully promulgated regulation at 11 C.F.R. 300.2 and the statutory language of 2 U.S.C. §441i. This would be an improper use of the Advisory Opinion process, and create substantial uncertainty in the law.

CLC and Common Cause take a slightly different tack. In addition to agreeing that kinship alone is not a basis for finding an agency relationship, CLC and Common Cause also agree that having raised money for Senator Reid does not create a *per se* agency. CLC writes, “an individual does not, for purposes of BCRA, become an ‘agent’ of a Federal officeholder or candidate in *all* political contexts, solely on account of having been authorized to raise hard money on behalf of that officeholder or candidate.” CLC Comment at 2-3 (emphasis in original). Common Cause agrees. Common Cause Comment at 2. Both, however, urge that the Commission adopt a “totality of the circumstances” test and find an agency relationship here. *Id.* at 2; CLC Comment at 3. However, neither commenter explains why these factors, combined, create an agency

² An interpretation that ever serving as an agent for a federal candidate would subject one to the limitations of the Act even when not acting as the candidate’s agent would mean, for example, that a candidate’s personal attorney, insurance agent, real estate broker, or financial planner would be subject to sanction if, with no authorization from the candidate, he solicited funds for the state party.

relationship. If Rory Reid is not acting as an agent of Senator Reid when soliciting funds, it is not explained how also being Senator Reid's son makes him agent. This approach would eviscerate their prior assurances that kinship alone is not sufficient to create an agency relationship: Any person other than Rory Reid could presumably engage in this activity, but Rory Reid could not solely due to his status as Senator Reid's son.

The only apparent basis for such a ruling would be that Rory Reid's status as Harry Reid's son creates "apparent authority" to act on behalf of Senator Reid. However, the Commission specifically sought comment on the advisability of including "apparent authority" in the definition of "agent" at the time of its rulemaking, *see* 67 Fed. Reg. 35654, 35658 (May 20, 2002), and concluded that under BCRA only actual authority, whether express or implied, should trigger liability. 67 Fed. Reg. 49064, 49082 (July 29, 2002); *see also* AO 2003-10, FEC Agenda Document 03-39, at 4. To now apply a broader – and different -- rule to Mr. Reid would go beyond the considered judgment of the Commission as reflected in the Final Rule and would add an arbitrary and unpredictable character to our decisions in this area.

In short, the commenters urge the Commission to repudiate its lawfully adopted regulations. Given that these commenters urged these same interpretations on the Commission during the rulemaking process, this is not surprising. *See* Common Cause, Comments on Notice 2002-7, May 29, 2002, at 17; Comments of the Campaign & Media Legal Center³ re Notice 2002-7, May 29, 2002, at 5-6; Comments of Center for Responsive Politics re Notice 2002-7, May 29, 2002, at 7. However, this is not the purpose of the AO process. As is well demonstrated in the primary opinion, the regulations are clear, and the conclusion of the AO flows naturally from them.

June 12, 2003

Bradley A. Smith
Vice Chairman

David M. Mason
Commissioner

Michael Toner
Commissioner

³ This is the former name of the Campaign Legal Center.